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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. WONDA KIDD, Defendant and Appellant.	A126763 (Alameda County Super. Ct. No. 159467C)

Defendant was convicted following a jury trial of two counts of grand theft (Pen. Code, § 487, subd. (a)), with excessive loss enhancements (Pen. Code, § 12022.6, subds. (a)(1) and (a)(2)), and two counts of identity theft (Pen. Code, § 530.5, subd. (a)).[1] She claims that the trial court erred in its instructions to the jury in response to questions, and asserts that several acts of prosecutorial misconduct were committed. Defendant also argues that the convictions of Counts 28 through 31 are not supported by the evidence. Finally, she maintains that the trial court erroneously denied her motion for acquittal of charges that ultimately resulted in a hung jury and were dismissed.

[1] All further statutory references are to the Penal Code unless otherwise indicated. Defendant was charged with a total of 16 counts with codefendants, but found guilty on only four. The remaining twelve charges did not result in guilty verdicts; some were dismissed by the prosecution before being submitted to the jury, others resulted in not guilty verdicts, and on five others the jury did not reach verdicts and the charges were subsequently dismissed.

We conclude that substantial evidence does not support the convictions of grand theft and identity theft, and reverse those convictions. We further conclude that the trial court erred by failing to grant defendant's motion for acquittal on Counts 12 through 14.

STATEMENT OF FACTS

Defendant was charged for acts undertaken in her capacity as escrow officer for the sale of three residences in Oakland in 2005: one at 3118 West Street (the West Street property); another at 728 Apgar Street (the Apgar Street property); and a third at 4466 MacArthur Boulevard (the MacArthur Boulevard property). Her convictions on Counts 28 through 31 relate only to the West Street property transaction.[2] The three transactions were part of an extensive, complex real estate fraud scheme primarily orchestrated by real estate agent Karim Akil, also known as Scott Kinney.[3]

In 2005 and 2006, defendant was an escrow officer at the Financial Title Company office in Castro Valley. She previously worked as a real estate agent and as an escrow officer at other title companies. Her base salary at Financial Title was $10,000 per month, supplemented by incentive commissions – which she typically shared with assistants – if her monthly revenue exceeded $25,000. Financial Title Company, an underwritten title business that issued title insurance policies to purchasers of real estate or lenders who financed purchases, filed for bankruptcy and ceased business operations in 2008.

Evidence was presented that described the *generic* expected duties of escrow officers in real estate transactions. Escrow officers act as impartial third party stakeholders of funds to be delivered upon performance of specified instructions. In every real estate transaction, the escrow officer owes a fiduciary duty to the principals, who may be the sellers, buyers, realtors, lenders, or third-party creditors, to process and effectuate the transaction in accordance with directions given by the principals.

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[2] Our recitation of facts will focus on the West Street property transaction upon which the convictions are based. We will discuss the two other transactions as necessary to resolve the issues presented in this appeal.

[3] As the parties have done, we will refer to him as Akil, although some of the witnesses called him Scott or Kinney.

Typically, the escrow officer's duties are: place and hold money deposited in the escrow account until completion of the transaction; assist the buyer and mortgage broker or lender in processing and facilitating a loan; obtain necessary information to satisfy liens, payment of taxes or any existing debts to be paid at the close of escrow; compile and draft a preliminary title report based on a title search of the property; issue a closing statement, followed by a final disbursement report to disclose the accounting of the transaction. Ultimately, the escrow officer manages and disperses the funds in escrow based on instructions received by the parties, primarily the funding lender. The escrow officer must remain neutral, and interface at arms length with all parties to the transaction.

The West Street Property Transactions.

Wilson Berry, who operated a handyman service, purchased the West Street Property in 2004 or 2005, along with his wife Terri.[4] He intended to develop the property, which was in need of repairs, and either rent it or "hold onto it" as a potential retirement residence. Within a few months of the purchase, however, by early 2005, Berry was "feeling the pressure" of paying mortgages on his primary residence and the West Street property, so he decided to seek a partner or investor to provide "financial assistance" to complete the renovation of the property. Through a friend who was a real estate "scout," Berry was referred to Akil, whom he knew as "Scott," as a person to invest in the West Street property. Berry and Akil reached an agreement in February of 2005 for Akil to take over the mortgage payments on the West Street property. Akil also paid Berry $30,000; in exchange, Berry signed a grant deed transferring title to the property to Akil. According to their agreement, Akil was "supposed to" assume the monthly mortgage payments on the property, although the mortgage remained in Berry's name. Berry further testified that he and Akil also had an "arrangement" for Akil to pay him "extra money at the end of the deal," an additional $60,000, when remodeling of the house was completed.

[4] For the sake of clarity and convenience we will refer to Wilson Berry by his last name, and his wife Terri by her first name.

No escrow on the property was created, but the conveyance to Akil took place on February 18, 2005. Akil suggested that they use the Financial Title Company office in Castro Valley to notarize the grant deed. Berry and his wife signed the grant deed, which read: "For valuable consideration, receipt of which is hereby acknowledged, Wilson Berry and Terri Berry, husband and wife, as joint tenants, hereby grants [*sic*] to Karim Akil, a single man, a partner in real property." Defendant notarized the grant deed after examining their driver's licenses and taking their thumb prints. Berry testified that he never received a copy of the deed, which did not bear a county recorder's stamp. According to Berry, defendant "took all the paperwork." For a while, Akil did not make the promised mortgage payments on the West Street property, but he eventually began to do so.

On July 20, 2005, another grant deed was executed that conveyed the West Street property to "Darnell Patrick Thomas." The deed bears the purported signatures of Berry and his wife, and reads: "For valuable consideration, a receipt of which is hereby acknowledged, Wilson Berry and Terri Berry, husband and wife, as joint tenants, hereby grants [*sic*] to Darnell Patrick Thomas, a single man, a partner in real property." The purchase price for the West Street property is listed as $620,000. The preliminary change of ownership and closing statement affirm that Darnell Patrick Thomas obtained first and second loans funded by New Century Mortgage Corporation (New Century) in the amounts of $496,000 and $124,000, with $337,123.29 paid to the seller. Although defendant – or her assistant on behalf of defendant – is listed in many of the documents in the Financial Title Company escrow file, No. 43097229-410-WK1, as the escrow officer, below the signatures of the Berrys on the grant deed is a notary stamp in the name of "Kemba Zola Upshaw," Commission No. 1378927.

A rather crude handwritten letter in the Financial Title Company escrow file for the transaction, ostensibly signed by the Berrys, instructs a payment to Akil in the amount of $337,123 at the close of escrow. The letter, which effectively assigned the Berry's entire interest in the property to Akil, is not dated, and fails to mention "who prepared this instruction," deposited it into the escrow file, or "what steps escrow took to verify or

confirm the validity of the instruction." No evidence presented at trial directly tied this document to defendant. The "Final Disbursement Report" of the Financial Title Company escrow file states that Akil received the payment specified in the letter; a check was issued to the Berrys, voided the same day, then issued to Akil.

The escrow file for the second West Street property transaction also includes other documents with the Berrys' signatures: a sellers' closing statement, sellers' escrow instructions, the statement of information, and the preliminary report. A deed of trust and request for notice of default, both initialed and signed by Darnell Patrick Thomas, were notarized by defendant on July 21, 2005, as were additional loan documents. Akil was listed as the buyer/borrower in the escrow file preliminary report.

Berry testified that he and his wife did not sign the deed or the escrow file letter, and never requested an escrow file to be opened for the transaction. They were not acquainted with Darnell Thomas, and did not give permission for a sale of the West Street property to him.

New Century approved and funded the loans for purchase of the West Street property, along with the loans to purchase the Apgar Street property, and the MacArthur Boulevard property, all based on representations made by a mortgage broker, Hidden Brook Mortgage (Hidden Brook) in Vallejo, a company that was operated by Akil. Hidden Brook originated and submitted the loans to New Century, and was entirely responsible for obtaining the information and documentation provided from the prospective borrowers to the lender. The borrower's bank completed the verification of deposit form provided by the mortgage broker, which confirmed that the borrower had "the amount of funds necessary to close the loan." The escrow officers did not participate in the loan verification or documentation process. New Century relied on the accuracy of the information provided by Hidden Brook in the loan applications, and would not have funded loans if the loan applications contained misrepresentations or incorrect information. An investigation of the files of Hidden Brook in 2006 revealed "a lot of misrepresentation in their files."

For the West Street property loan obtained by Darnell Thomas, a letter signed by "Tamara Brown" verified that the borrower had accounts with Union Bank. Tamara Brown never worked for Union Bank, and opinion testimony was adduced that the accounts stated in the verification letter were not genuine.

After escrow closed, Akil deposited the check issued to him by Financial Title Company for $337,123.29 to his account. On September 12, 2005, by grant deed Thomas conveyed the West Street property to Akil. Akil thus had title to the property along with the proceeds from the sale of it that were financed by a loan from New Century.

The Apgar Street Property Transactions.

Defendant was also the escrow officer for one of two confusing sales of the Apgar Street property, which in February of 2005 was owned by the Casetta Becknell Revocable Living Trust. Casetta Becknell died in October of 2004. Her daughter, Marsha Willis, the trustee of the Casetta Becknell Revocable Living Trust, listed the Apgar Street property for sale with real estate agent Heather Hawkins. When Hawkins listed the property for sale, she opened an escrow with First American Title Company, which was the company she used "in most transactions."

On February 18, 2005, Akil contacted Hawkins and signed an offer to purchase the Apgar Street property for a purchase price of $360,000. The offer was accepted by Willis. With the approval of the parties, Hawkins acted as dual agent for both Willis and Akil in the transaction. Hawkins agreed to Akil's request to use the Castro Valley branch of Financial Title Company as the escrow company, and defendant became the escrow agent for the transaction.

On February 25, 2005, only a few days before escrow was scheduled to close, defendant sent Hawkins a "new order sheet" with the final statement that listed the sale price for the Apgar Street property as $450,000, rather than $360,000, and designated an "assignee" to the contract. Hawkins contacted defendant to ask about the increase in the purchase price. Defendant referred Hawkins to someone named "Greg," identified at trial as Greg Orr, as the person who "was going to receive the extra money" specified in the

purchase agreement to "do the repairs" on the property. To that point Hawkins was unaware that repairs or an increase in the purchase price were contemplated. Hawkins was told that the increased price specified in the final statement reflected the "future value" of the property – that is, the difference between the selling price and the amount of the loan – after the planned repairs were done. Hawkins was aware that in 2005 banks were commonly willing to loan an increased amount to a buyer based on the future value of the property, but the seller received only the lower amount, in this case $360,000.

The estimated closing statement prepared by defendant also included a "seller credit to the buyer" in the amount of $13,800, and a payment of $100,000 to GLO Enterprises, or Greg Orr, that neither Hawkins nor Willis authorized. Hawkins discussed the seller credit with defendant, but the $13,800 payment was not deleted from the final closing documents signed by Willis.[5] The day after escrow closed Hawkins protested to defendant that payment of the credit was a "mistake." Defendant told her to contact "Greg," to whom the "check" had already been distributed. Greg agreed to have "somebody" repay the seller credit, but Hawkins never received repayment, and ultimately paid Willis $13,800 from her own funds.

The record reflects that the Apgar Street property was also sold from Casetta Becknell to Connie Sue Burgin and Ivan Utsey, in a transaction dated February 2, 2005, for a purchase price of $460,000. The real estate agents listed in the escrow documents for the sale were Amy Schloemann and Denise Clausen, neither of whom Willis retained or even knew. Willis was also not acquainted with the listed buyers Burgin and Utsey, and did not agree to sell the property to them. The "Acceptance of Offer" bore the forged signature of Becknell, who died months before the document was signed.

Burgin, one of the listed buyers, testified that she intended to purchase the house by herself or with her "live-in boyfriend" Kevin Singleton. Singleton referred her to a close friend, Akil, to act as her real estate broker for the Apgar Street transaction. Burgin never met Heather Hawkins or Willis.

[5] Hawkins testified that she "missed" the failure of final settlement statement to indicate a removal of the seller credit to the buyer.

Burgin was ignorant of real estate matters, and relied on Akil to guide her through the process. Akil advised Burgin that the Apgar Street property was affordable to her, and offered to perform "repairs on the home" before the transaction closed. Akil also helped Burgin obtain financing from New Century in loan amounts of $368,000 and $92,000 to finance the purchase. She decided to make an offer on the property.

Burgin met Akil and a "male" notary at the Marriott Hotel in Emeryville to sign the documents to complete the purchase. She did not know if an escrow account was ever opened, and never met defendant. The "first time" Burgin signed the documents she "scratched things out" that were inconsistent with her understanding of the terms. She also noticed that the name of another person unknown to her, Ivan Utsey, appeared as a cosigner on the loan application to New Century. Singleton and Akil counseled Burgin that Utsey would serve the purpose of providing her with the "strong buyer" she needed to act as a cosigner for the loan, and after the transaction closed he would "be quitclaimed off" the deed. A letter was placed in the loan application file submitted to New Century, with Burgin's forged signature, that stated she and Utsey, as cosigners of the loan, planned to marry soon. Burgin thought that even without Utsey or Singleton to financially assist her, she could make the loan payments herself if necessary.

After the transaction was completed on March 8, 2005, Akil performed some repairs on the Apgar Street property, but did not complete the promised remodeling. He gave Burgin and Singleton a check for $10,000 to undertake "additional repairs" needed to "make the house livable." Utsey never signed "the paperwork" to remove his name from the deed, and Burgin did not receive any assistance with the loan payments, so she ultimately defaulted and relinquished ownership of the property.

The MacArthur Boulevard Property Transaction.

In 2005, Charles Blackwell sold the MacArthur Boulevard property to Network Investment Group and Robert Davis for around $440,000. Within 30 days or so, Davis, a real estate investor, then sold the property for $560,000 to $575,000, using Akil and his company Hidden Brook as the mortgage broker. Davis engaged in numerous real estate transactions in 2005 with Akil, known to him as Scott Kinney. Davis did not "know who

the actual buyer was," but dealt with Akil to complete the transaction, and assumed the buyer was Hidden Brook. Akil used Financial Title Company as the title company; defendant acted as escrow officer. Davis was unfamiliar with defendant before the transaction, and did not use her as escrow officer thereafter.

The Final Disbursement Report for the MacArthur Boulevard property in the Financial Title Company escrow file listed Network Investment Company as the seller and Nicole Esteen as the buyer. According to the Final Disbursement Report, Network Investment Company received $46,758.10 for the sale, Akil received $38,000, and GLO Enterprises received $24,550. The escrow file for the transaction reflects receipt of two loans by Esteen as buyer of the property: one for $432,000; the other for $108,000.

The grant deed for the MacArthur Boulevard property stated that Network Investment Company was the seller and Nicole Esteen was the buyer of the property. Two signatures of Davis as seller on behalf of Network Investment Group appear on the grant deed: one, just above the signature of defendant on the left side of the deed, was not signed by him; another, on the right side of the deed, was his valid signature. Davis testified that he did not sell the property to Esteen. Davis denied that he used defendant and Financial Title Company to facilitate an inflated price transaction with Esteen as a "straw buyer" of the MacArthur Boulevard property. He also testified that he did not sign the final documents in defendant's presence at the Financial Title Company office in Castro Valley. Instead, he signed the documents at a Starbucks in Dublin, with a man named Joe Klutch acting as notary.

Esteen testified that she did not purchase the property or grant anyone permission to use her name on the deed. Her signature on the deed as buyer was a forgery.

Checks Paid to Defendant and Her Daughter from Hidden Brook.

An examination of defendant's escrow log disclosed that between December 1, 2004, and May 8, 2007, she extensively used Hidden Brook as the mortgage broker in 333 escrow transactions. Evidence also revealed that four checks were issued from Hidden Brook to defendant between January and March of 2005, all signed by Akil: three in the amount of $500, and one in the amount of $1,000. The checks bore references in

the memo lines to "hook up" and "pain and suffering." Two additional checks were issued from Hidden Brook to defendant's daughter Ashanti Hines, who worked at Financial Title Company as an escrow assistant and a marketing representative: one dated August 1, 2005, for $13,000, with "hook up" in the memo line; another dated August 4, 2005, for $1,000, with "present" in the memo line. Hines was not called as a witness in the trial by either side. No evidence was presented to explain the reason for the payments to defendant or Hines.

The Defense Evidence.

Defendant testified that she became acquainted with Akil in 2003, during a real estate transaction she "closed" as an escrow officer at Ticor Title Company. She also knew he used the name Scott Kinney, and called him Scott. Akil regularly brought her "additional transactions," and often visited her office in Castro Valley. Akil's company, Hidden Brook, became a "substantial client" of Financial Title Company by 2005, and served as the loan broker for a large percentage of transactions for which defendant was the escrow officer. According to defendant, she merely processed Akil's transactions as escrow officer, and did not discuss his business with him. Defendant asserted that she "had no idea" that "anything fraudulent" was transpiring with the escrows she completed for Akil. She was merely "trying to keep up" with the tremendous volume and flow of escrow business that she received in the Financial Title Company office in 2005. Defendant testified that Akil never asked her to falsify a notary, forge a signature, or use someone's identity, and she did not do so.

Defendant acknowledged that on February 18, 2005, she notarized the grant deed that conveyed the title to the West Street property to Wilson and Terri Berry, but she did not open an escrow for the conveyance. She did nothing more than check the Berrys' identifications, take their thumb prints, and notarize their signatures on the document, as she did with all of her notarizations. In accordance with her typical notary practice, after defendant notarized the deed she left it with the clients or their agent, and did not keep a copy. The unrecorded grant deed was thereafter found at Akil's home during a search of his residence. Defendant denied that she had ever "done a false notary."

Defendant also testified that at the request of Akil she opened an escrow for the second West Street property conveyance, the sale from the Berrys to Darnell Thomas. Defendant's file included a "new order sheet" for the West Street Property transaction, which indicated that Akil opened the escrow and gave her information "over the phone." When the escrow was opened and the preliminary title report listed the Berrys as sellers, defendant did not recall that she had notarized their signatures on the grant deed five months before.

Once an order was received and the escrow was opened, a file was created and a preliminary title report was prepared within the first three to four days. Defendant usually had her assistant place all of the information in the file: personal and financial information on the buyers and sellers, existing mortgages, loan numbers and liens, insurance policies, taxes and tax liens, and all title documentation.[6] The preliminary title report for the West Street property transaction listed Wilson and Terri Berry as owners in joint tenancy; first and second mortgages in the amounts of $250,000 and $15,000 on the property existed.

Defendant often did not obtain the initial sales agreement. Rather, due to the inevitable changes in the agreement she sent out "term sheets" to the parties to specify the provisions of the transaction just before the escrow instructions were drawn. For the West Street property transaction, defendant received the "lender's instructions" from New Century on July 21, 2005, which itemized the broker's and lender's fees attached to the transaction, listed the documents that required signatures, and provided an addendum with outstanding conditions precedent to be satisfied prior to final approval and funding of the loan. The stated loan expiration date was August 11, 2005. Defendant's obligation was to deal with the mortgage broker to effectuate satisfaction of the conditions. Hidden Brook, the mortgage broker, not defendant, obtained the necessary financial verifications and other information. The escrow file indicated that defendant's assistant completed the "funding package" and sent it to New Century. Defendant testified that the loan approval

[6] The "title plant" for Financial Title Company obtained the information placed in the preliminary title report.

by New Century for the West Street property transaction waived some standard verifications and requirements – proof of an earnest money deposit, verification of rents, and verification of the buyer's employment – which was unusual.

Defendant did not specifically recall the handwritten note in the escrow file with the Berrys' false signatures that directed payment of $337,123.29 to Akil at the close of the West Street property transaction.[7] She did not check to ascertain if the Berrys' signatures on the note were valid. Defendant testified that her "normal procedure would have been" to contact one of the parties "just to verify" the instruction, but she did not "write down anything" in the escrow file to memorialize that she called anyone to determine if "that's what they wanted" to do.

Nola Upshaw, not defendant, notarized the signatures on the grant deed by the Berrys as sellers of the West Street property to Thomas. Defendant was not acquainted with Upshaw. Defendant did not compare or check the signatures verified by another notary, and did not keep the prior deed signed in her presence by the Berrys. She personally notarized the signature of the purported buyer Thomas after checking his identification and taking his thumb print. Defendant testified that she handled other transactions, either as a notary or escrow officer, in which Thomas was a party. Akil and Thomas worked together on several transactions between May and July of 2005, that were notarized by defendant. She was unaware of the nature of the business relationship between Akil and Thomas.

Defendant testified that the checks she received from Akil in the total amount of $2,500 were for "overtime work" she "did outside the office for him," usually to "draw" documents after hours. Akil merely left her the checks with a thank-you note. She recalled that the $1,000 check was given to her by Akil after he harassed her during an entire weekend to prepare documents for signature on a Sunday evening to be submitted to a lender on Monday morning. The three $500 checks were related to three other separate transactions. She did not remember the particular escrows to which the

[7] Of course, the Berrys had already conveyed the property to Akil months before.

payments related. Other than the four checks, Akil did not make any payments to her. As for the $13,800 and $1,000 checks from Akil to defendant's daughter, defendant was not even aware of the checks until she received discovery from the prosecution. Defendant denied that she altered any escrow documents for Akil, or ignored any changes in escrow instructions for him.

DISCUSSION

I. The Evidence to Support the Grand Theft Convictions (Counts 28 and 29).

Defendant complains that the record lacks substantial evidence to support the convictions for grand theft by false pretenses associated with the West Street property sale, Counts 28 and 29. She argues that even if false representations were made in the two loan applications to New Century by Darnell Thomas, or in other escrow documents, "use of false information, without more evidence of an intent to deprive the owner of his property, is insufficient to sustain a theft conviction." Defendant points out that the prosecution failed to adduce any evidence that the loans were not repaid by Thomas or Akil, or any evidence that she intended to defraud the lender.

Our role as "an appellate court in reviewing the sufficiency of the evidence is limited." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138; see also *People v. Lewis* (2001) 25 Cal.4th 610, 643; *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061.) To resolve defendant's challenge to the evidence supporting the grand theft convictions, "we evaluate the whole record to ascertain whether there is substantial evidence to support the verdict." (*People v. Tabb* (2009) 170 Cal.App.4th 1142, 1151.) "[W]e ask not whether there is evidence from which the trier of fact could have reached some other conclusion, but whether, viewing the evidence in the light most favorable to respondent, and presuming in support of the judgment the existence of every fact the trier reasonably could deduce from the evidence, there is substantial evidence of appellant's guilt, i.e., evidence that is credible and of solid value, from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Thus, our sole function as a reviewing court in determining the sufficiency of the evidence is to determine if any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." (*In re Michael M*. (2001) 86 Cal.App.4th 718, 726, fn. omitted; see also *In re Babak S.* (1993) 18 Cal.App.4th 1077, 1088–1089.)

As a reviewing court we do not resolve credibility issues or evidentiary conflicts. Those determinations are made by the trier of fact. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "We may not reverse a conviction for insufficiency of the evidence unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the conviction." (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955; see also *People v. Wader* (1993) 5 Cal.4th 610, 640.)

" 'This standard applies whether direct or circumstantial evidence is involved. "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' " [Citation.]' [Citation.]" (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.)

"However, '[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. . . .' [Citation.]" (*People v. Tripp, supra,* 151 Cal.App.4th 951, 955–956; see also *People v. Wader, supra,* 5 Cal.4th 610, 640.) " 'Substantial evidence must be more than evidence which merely raises a strong suspicion of guilt as mere suspicion will not support an inference of fact.' [Citation.]" (*People v. Thongvilay* (1998) 62 Cal.App.4th 71, 79.) To withstand an insufficiency of the evidence challenge, the trial court must find and the record must contain evidence substantial enough to support the finding of each essential element of the crime. (*United States v. Gaudin* (1995) 515 U.S. 506, 522–523; *People v. Johnson* (1992) 5 Cal.App.4th 552, 558.) That means not only every element of the offense, but also all of the "facts necessary to establish each of those elements." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277–278; see also *People v. Crawford* (1997) 58 Cal.App.4th 815, 821.)

We are reviewing the evidence to support the grand theft convictions. "Section 487, subdivision (a), provides: 'Grand theft is theft committed . . . [¶] (a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars ($400) . . . .' 'Theft' is defined in section 484, subdivision (a), as follows: 'Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .' " (*People v. Fenderson* (2010) 188 Cal.App.4th 625, 635.) "The authorities are clear that conviction of grand theft may be had upon proof of either larceny, embezzlement or obtaining money by false pretenses." (*People v. McManus* (1960) 180 Cal.App.2d 19, 37.) "An essential element of any theft crime is the specific intent to permanently deprive the owner of his or her property." (*People v. Williams* (2009) 176 Cal.App.4th 1521, 1526; see also *People v. Ortega* (1998) 19 Cal.4th 686, 693.)

In the present case, we are dealing with theft of property by false pretenses, which "is the fraudulent or deceitful acquisition of both title and possession." (*People v. Ashley* (1954) 42 Cal.2d 246, 258.) "To support a conviction of theft for obtaining property by false pretenses, it must be shown that the defendant made a false pretense or representation with intent to defraud the owner of his property, and that the owner was in fact defrauded. It is unnecessary to prove that the defendant benefited personally from the fraudulent acquisition. [Citation.] The false pretense or representation must have materially influenced the owner to part with his property, but the false pretense need not be the sole inducing cause." (*Id*. at p. 259.) And, as with any form of theft, "For property to be 'stolen' or obtained by 'theft,' it must be taken with a specific intent." (*People v. MacArthur* (2006) 142 Cal.App.4th 275, 280.)

We are also presented with a case in which defendant may incur criminal liability as a perpetrator of the grand theft offenses or as an aider and abettor. "Under California law, a party to a crime is either a principal or an accessory. (§ 30.) The Legislature has defined principals as '[a]ll persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . .' (§ 31.)" (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 523.) " 'All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed.' [Citations.] Thus, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116–1117.)

"Aider-abettor liability exists when a person who does not directly commit a crime assists the direct perpetrator by aid or encouragement, with knowledge of the perpetrator's criminal intent and with the intent to help him carry out the offense." (*People v. Miranda* (2011) 192 Cal.App.4th 398, 407.) " 'Aider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea.' [Citation.] We have defined the required mental states and acts for aiding and abetting as: '(a) the direct perpetrator's actus reus—a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea—knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime.' [Citation.]" (*People v. Thompson* (2010) 49 Cal.4th 79, 116–117.)

We agree with the Attorney General that considerable evidence of fraud associated with the two sales of the West Street property in 2005 was presented. In fact, the evidence established a massive real estate fraud scheme, orchestrated by Akil and participated in by others, that operated to fraudulently sell the West Street property, among others, and acquire loan proceeds from New Century to finance the spurious

transactions. Akil and Hidden Brook, as real estate agent and mortgage broker, were consistent clients of Financial Title Company, and defendant acted as escrow agent for a number of their transactions, including the West Street property, the Apgar Street property, and the MacArthur Boulevard property. Fundamental misrepresentations and nondisclosures related to the loan application to finance the West Street property purchase were numerous: the unrecorded grant deed from the Berrys to Akil in February of 2005 was not divulged; the Berrys' status as property owners and sellers of the property to Thomas in July of 2005 was misrepresented; assertions that Thomas was the lawful purchaser of the property and granted New Century a valid security interest were deceptive. We also recognize that defendant, in her capacity as escrow officer for the West Street property transaction, assisted in the completion of the fraudulent sale from the Berrys to Thomas, simply by processing the transaction.

Where the evidence to support the convictions becomes deficient, however, is that it fails to establish the requisite intent on the part of defendant to assist in the commission of the grand theft offenses. We must find that defendant had knowledge of the direct perpetrators' unlawful intent to defraud New Century, and in addition intended to assist in attaining the unlawful ends by engaging in acts as an escrow officer that facilitated the ultimate realization of the unlawful scheme. (See *People v. Thompson, supra,* 49 Cal.4th 79, 117.)

No evidence either directly or circumstantially demonstrates with any degree of persuasiveness that defendant was aware of the fraudulent nature of the West Street property sales. First, she did not even act as escrow agent for the first sale from the Berrys to Akil. She notarized the Berrys' signatures on the unrecorded grant deed to Akil, merely by determining and attesting that they were whom they purported to be – and, in fact, they were. Akil, not defendant, retained the unrecorded deed, and defendant had no further connection with the transaction. We also know she acted as escrow officer for the second, fraudulent sale from the Berrys to Darnell Thomas six months later, but no evidence associates her with the fraud. In fact, defendant did not ultimately notarize the grant deed for the sale. Akil enlisted another notary to attest to the forged signatures

of the Berrys on the grant deed, as he did with the Apgar Street and MacArthur Boulevard transactions, which indicates to us that he did not trust defendant to notarize and submit false title documents. Defendant also filed and sent documentation, some of which turned out to be fallacious, to New Century, as any escrow officer may have done, but Hidden Brook solely obtained and submitted the false information and documentation provided from the prospective borrowers. According to the evidence, defendant did not participate in the loan verification or documentation process. Further, we do not even know from the evidence if Thomas or the buyers of the other two properties failed to repay the loans.

The evidence also demonstrates that defendant followed the instructions presented to her by the parties, including the forged note that directed payment of the proceeds to Akil rather than the Berrys. By doing so, she acted in accordance with the described duties of an escrow officer. Her failure to investigate suspicious documents or information certainly suggests a lack of proper diligence. While in some instances defendant may have been negligent or perhaps even derelict in the performance of her escrow duties, we cannot equate her inattention with knowledge of the intended grand thefts.

Finally, we do not find evidence of knowledge and intent in defendant's receipt of four checks from Akil, or the money paid to defendant's daughter. No evidence, not the timing of the checks or the vague references on them, related the money received by defendant to any wrongdoing on her part. Also, nothing links defendant to the checks received by her daughter. As far as we can discern from the record, the checks were for innocuous purposes related to defendant's role as escrow officer, rather than compensation for any fraudulent acts.

No connection between defendant and Akil or Thomas, other than a purely legitimate business relationship, was produced. What is conspicuously and tellingly missing from the record is testimony from anyone who participated in the illegitimate transactions, or in fact any evidence at all, that defendant had knowledge of the fraudulent nature of the scheme, let alone intended to act with others to facilitate it. This

evidentiary gap is, in a word, substantial. The evidence placed defendant in a position analogous to someone who was present with the perpetrators at the scene of a crime. Mere presence at a crime scene, without further evidence that the defendant knew the perpetrator intended to commit the crime and shared the purpose or intent to commit, encourage, or facilitate the commission of the crime, does not prove aiding and abetting. (See *People v. Miranda, supra,* 192 Cal.App.4th 398, 407; *People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1103; *People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) Defendant acted in a professional capacity with the perpetrators, but no other circumstances indicate she knew of the fraudulent scheme, let alone intended to aid and abet the crimes.

Even when the evidence is considered in its totality, we conclude that any inference of defendant's criminal intent reaches only the level of conjecture. "Evidence is sufficient to support a conviction only if it is substantial, that is, if it ' "reasonably inspires confidence" ' [citation], and is 'credible and of solid value.' [Citations.]" (*People v. Raley* (1992) 2 Cal.4th 870, 891.) " 'While substantial evidence may consist of inferences, such inferences must rest on the evidence; inferences that are the result of speculation or conjecture cannot support a finding. [Citation.]' [Citation.]" (*In re Anthony G.* (2011) 194 Cal.App.4th 1060, 1065.) " ' "A reasonable inference 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.' " [Citation.] . . .' [Citation.]" (*People v. Tripp, supra,* 151 Cal.App.4th 951, 959.) Without the necessary substantial evidence to support an inference that defendant knew the West Street property transaction was fraudulent and acted to promote the objectives of endorsing the loan to Thomas and effectuating the sale of the property to him, we must reverse the grand theft convictions. (See *People v. Cordell* (2011) 195 Cal.App.4th 1564, 1579.)

II. The Identity Theft Convictions (Counts 30 and 31).

Defendant also challenges the evidence to support the two identity theft convictions, Counts 30 and 31, which are based on the false use of the Berrys' identifying information and signatures on the grant deed for the West Street property. Defendant asserts that the record fails to prove the "unlawful purpose" element of the identity theft offenses.

Although section 530.5 has been amended several times since its enactment, at all times pertinent to this case, subdivision (a) has provided: "Every person who willfully obtains personal identifying information, as defined in subdivision (b), of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, or medical information in the name of the other person without the consent of that person, is guilty of a public offense, and upon conviction therefor, shall be punished either by imprisonment in a county jail not to exceed one year, a fine not to exceed one thousand dollars ($1,000), or both that imprisonment and fine, or by imprisonment in the state prison, a fine not to exceed ten thousand dollars ($10,000), or both that imprisonment and fine." " 'In order to violate section 530.5, subdivision (a), a defendant must both (1) obtain personal identifying information, and (2) use that information for an unlawful purpose. [Citation.] Thus, it is the use of the identifying information for an unlawful purpose that completes the crime and each separate use constitutes a new crime.' [Citations.]" (*People v. Johnson* (2012) 209 Cal.App.4th 800, 817, italics omitted.) "[W]illfulness, when coupled with use for an unlawful purpose, provides a sufficient mens rea for the offense;" injurious intent or result is not required. (*People v. Hagedorn* (2005) 127 Cal.App.4th 734, 744.)

We agree with defendant's contention that the record fails to provide adequate proof that *she* used the Berrys' identities for an "unlawful purpose." For essentially for the same reasons that the grand theft convictions are not supported by the evidence, we conclude that the identity theft convictions cannot stand. The inference that defendant in her professional position as escrow officer willfully obtained and passed on the Berrys' forged personal identifying information to fraudulently convey the West Street property

to Thomas is simply too weak to support the convictions. Nor does the evidence prove the essential element of defendant's *willful* use of the identifying information, other than for the legitimate purpose of performing escrow duties. Defendant did not even notarize the grant deed on which the Berrys' forged signatures appear.

Substantial evidence establishes that *Akil* and *Thomas* used the Berry's personal information for the unlawful purpose of completing the fraudulent West Street property transaction, but we cannot find that *defendant* had knowledge of the perpetrators' intent to use the Berrys' signatures for an unlawful purpose, or that she intended to assist them in obtaining the fraudulent loan or conveyance to Thomas. Therefore, the identity theft convictions must also be reversed.

III. The Double Jeopardy Prohibition Against the Retrial of Counts 12, 13, and 14.

Our conclusion that the grand theft and identity theft convictions are not supported by the evidence bars retrial of Counts 28 through 31 under double jeopardy principles. (*Monge v. California* (1998) 524 U.S. 721, 727–728; *Tibbs v. Florida* (1982) 457 U.S. 31, 40-41; *People v. Seel* (2004) 34 Cal.4th 535, 542; *People v. Tripp, supra,* 151 Cal.App.4th 951, 959.)[8] Defendant also requests that we declare a prohibition against retrial of the dismissed "grand theft charges in Counts 12, 13, and 14," related to the sale of the Apgar Street property. She argues that the trial court erred by denying her motion for acquittal (Pen. Code, § 1118.1), brought at the conclusion of the prosecution's case on grounds of insufficient evidence. Without comment, the trial court denied the motion for acquittal, and the case on all counts – with the exception of Count 16 that was dismissed by the prosecution – went to the jury. As to Counts 12 through 14, along with Counts 32 and 33, the jury was unable to reach a verdict. The defense thereafter moved to dismiss those counts "in the interest of justice" (§ 1385). The court declined to dismiss the charges but expressed willingness to grant a motion for mistrial. The prosecutor moved to "dismiss those counts," and the court granted the motion to "dismiss those Counts, 12,

[8] "[A]n appellate reversal for insufficient evidence is the functional equivalent of an acquittal at trial," and bars retrial of the charges. (*People v. McCann* (2006) 141 Cal.App.4th 347, 354.)

13, 14, 32, and 33." Defendant's argument is that if the "motion for acquittal should have been granted, then double jeopardy should have attached and retrial should be barred."

The Attorney General suggests that we cannot review the trial court's denial of the motion for acquittal in this appeal. The contention is that Counts 12, 13, and 14 were "dismissed prior to judgment," so no "final judgment of conviction" exists as to those counts, and no appellate review is authorized by section 1237.

" ' "It is settled that the right of appeal is statutory and that a judgment or order is not appealable unless expressly made so by statute." ' [Citations.] Section 1237, subdivision (a) confers on the defendant the right to appeal from 'a final judgment of conviction.' However, section 1259 makes clear that the full scope of appeal encompasses '*any question of law involved in any ruling, order,* instruction, or thing whatsoever said or done at the trial or *prior to* or after *judgment,* which thing was said or done after objection made in and considered by the lower court, and which *affected the substantial rights of the defendant*.' (§ 1259.) '[T]he Legislature has provided for appellate review of judgments and postjudgment orders *and* any intermediate order or decision which involves the merits or necessarily affects that judgment or postjudgment order, or which substantially affects the rights of a party.' [Citation.] Under section 1259 'an appellate court may review any question of law involved in any order made prior to judgment.' [Citation.]" (*People v. Mena* (2012) 54 Cal.4th 146, 152–153, italics added.)

The trial court's denial of defendant's motion for acquittal is a ruling of law prior to judgment that may be reviewed on appeal under section 1259. (See *People v. Trevino* (1985) 39 Cal.3d 667, 699, disapproved on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1219–1222; *People v. Wilson* (1963) 60 Cal.2d 139, 150.) The fact that Counts 12 through 14 were dismissed in furtherance of justice after trial does not defeat defendant's right to appeal. Defendant's substantial rights may be affected if the charges dismissed pursuant to section 1385 are retried. When a trial produces neither an acquittal nor a conviction, retrial may be permitted if the trial ended " 'without finally resolving the merits of the charges against the accused.' [Citation.]" (*People v. Anderson* (2009) 47 Cal.4th 92, 104; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1306–1307; *People*

v. Craney (2002) 96 Cal.App.4th 431, 441–442; *People v. Salgado* (2001) 88 Cal.App.4th 5, 12–13.) In the context of a section 1385 dismissal, unless the court rules that the evidence is insufficient as a matter of law – which did not occur here – the ruling does not bar retrial. (*People v. Hatch* (2000) 22 Cal.4th 260, 271.) In contrast, if defendant was entitled to a judgment of acquittal based on insufficiency of the evidence to support the convictions, double jeopardy attaches and forecloses her retrial. (*Burks v. United States* (1978) 437 U.S. 1, 18; *People v. Batts* (2003) 30 Cal.4th 660, 678–679; *People v. Trevino, supra,* at p. 694.)

We proceed to examine the propriety of the trial court's denial of defendant's motion for acquittal of Counts 12 through 14. " 'The standard applied by a trial court in ruling upon a motion for judgment of acquittal pursuant to section 1118.1 is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction, that is, "whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." ' [Citation.] 'The purpose of a motion under section 1118.1 is to weed out as soon as possible those few instances in which the prosecution fails to make even a prima facie case.' [Citations.] The question 'is simply whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination.' [Citation.] The sufficiency of the evidence is tested at the point the motion is made. [Citations.] The question is one of law, subject to independent review." (*People v. Stevens* (2007) 41 Cal.4th 182, 200; see also *People v. Velazquez* (2011) 201 Cal.App.4th 219, 228–229; *People v. Arjon* (2004) 119 Cal.App.4th 185, 193.)

Examining the evidence related to the Apgar Street property transaction reveals that defendant acted as escrow officer for the sale of the property from Marsha Willis to Akil in February of 2005. Heather Hawkins acted as real estate agent for both parties. Just before escrow was scheduled to close, a "new order sheet" supplied by defendant with the final statement increased the sale price for the Apgar Street property from $360,000 to $450,000. The price and loan increase reflected contemplated repairs on the

property and the resulting "future value" of the property once the repairs were done, which at the time was a common practice. The closing statement prepared by defendant also included a "seller credit to the buyer" in the amount of $13,800, and a payment of $100,000 to GLO Enterprises, or Greg Orr, that neither Hawkins nor Willis had previously authorized. Over Hawkins's protest, the seller credit was included in the final closing documents prepared by defendant and signed by Willis. Orr received the payment, and agreed to repay the seller credit, but Hawkins never received repayment, and she eventually unilaterally paid Willis $13,800 from her own funds.

A second, concurrent and quite convoluted sale of the Apgar Street property was executed for a purchase price of $460,000. The forged name of Casetta Becknell, Willis' mother, was placed on the grant deed as seller; Connie Sue Burgin and Ivan Utsey were listed as buyers. Burgin placed the original offer on the property; her real estate agent was Akil. When the transaction closed, unknown to Burgin, Utsey's name appeared as an additional buyer of the property and cosigner on the loan application to New Century, ostensibly to provide Burgin with a strong cosigner for the loan. A forged letter in the loan application stated that Burgin and Utsey, as cosigners of the loan, intended to marry in the near future. The final sale documents were signed by Burgin before a "male" notary named Joel Klutch. Defendant did not participate in the transaction in any way, other than to notarize Utsey's signature, who appeared before her.

Although fraud is found in both transactions, and was extensive in the sale of the Apgar Street property to Burgin and Utsey, we again find nothing in the evidence of the transactions that points to defendant as a participating fraudulent party. The evidence of fraud by Akil, Singleton, and Orr does not prove defendant's knowledge and intent to defraud either Marsha Willis or the lender. First, Willis received all she expected from the sale, the $360,000 purchase price stated in the agreement. Defendant filed closing documents that specified an inflated purchase price of $450,000, but did so in accordance with instructions she received as escrow officer. Defendant discussed the price increase with the seller's agent Hawkins, and Hawkins testified that an increase in the purchase price to reflect "future value" was ordinary practice, particularly in contemplation of

expected repairs. No evidence was presented that defendant knew, or even had reason to know, she was assisting with a deceptive transaction. Finally, she did not even act as escrow officer in the sale to Burgin. Counts 12 through 14 are not supported by substantial evidence. We thus conclude that defendant's motion for acquittal on those charges was erroneously denied.

Counts 12 through 14 have been dismissed, and defendant has not been recharged with those offenses, so we will not in this appeal render a declaratory or advisory opinion on the authority of the prosecution to seek retrial of those charges. We will only reiterate that according to established law if defendant was entitled to acquittal, as we have concluded she was, retrial of the charges is foreclosed by double jeopardy principles. (*People v. Trevino, supra*, 39 Cal.3d 667, 699.)

DISPOSITION

Accordingly, the convictions of Counts 28 through 31 are reversed.[9] The case is remanded to the trial court with directions to grant defendant's motion for acquittal of Counts 12 through 14, and for any further proceedings not inconsistent with the views expressed herein.

_____

Dondero, J.

We concur:

_____

Marchiano, P. J.

_____

Banke, J.

[9] In light of our conclusion that the convictions are not supported by the evidence, we need not address or resolve the remaining issues defendant has raised in this appeal.